IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINALL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.6553 OF 2005.

Maheshwar Dattatraya Kale,
Age: 55 years, Occ.: Business,
R/o.U-5, State Bank Nagar,
Bibwewadi, Pune-37. .... Applicant.

Versus.

1. Capt.Atul Wasudeo Divekar,
   Age: 40 yrs., Occ.: Service,
   R/o.421, Mahatma Coop.Hsg.
   Society Ltd., Pune-31.
2. The State of Maharashtra. .... Respondent.

Shri M.S.Mohite for the Applicant.

Shri Sandeep A.Bhagat for the Respondent No.1.

Ms.Rajashree Gadhvi, A.P.P. for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 26th October, 2005.

ORAL JUDGMENT.

1. On the last date I have heard the learned Counsel appearing for the parties.

2. The Applicant is an accused in a private complaint filed under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act of 1881). The Respondent No.1 is the original Complainant in the said complaint. The said complaint

was heard by the learned Judicial Magistrate First Class, Pune. By his Judgment and order dated 27th July 2005, the learned Magistrate sentenced the Applicant to suffer simple imprisonment of six months and to pay compensation of Rs.13 lakhs to the Complainant and in default thereof to suffer simple imprisonment for 10 days.

3. An Appeal was preferred by the Applicant before the Sessions court. The Appeal was admitted by the learned Adhoc Addl.Sessions Judge, Pune. By order dated 22nd August 2005, the learned Judge directed that the substantive sentence passed by the trial Court is suspended till decision of the Appeal and till then the Applicant shall be released on P.R. Bond of Rs.25,000/- with one or two solvent sureties in the like amount. The learned Judge directed that the conviction and sentence stands suspended on the Appellant depositing half of the cheque amount i.e. Rs.6,25,000/- within 15 days. The challenge in this Application is to the said part of the order dated 22nd August 2005.

4. Shri Mohite appearing for the Applicant has made detailed submissions. He submitted that on a plain reading of section 357 of the Code of Criminal

Procedure, 1973, the learned Magistrate could not have imposed punishment in default of payment of compensation. He submitted that the direction was to make payment of compensation and not fine and therefore, the order passed by the learned Magistrate directing that in default of payment of compensation, the Applicant will have to suffer simple imprisonment for 10 days is patently illegal. He submitted that under section 389 of the said Code, the learned Additional Sessions Judge could not have imposed condition while suspending substantive sentence by directing the Applicant to deposit half of the cheque amount i.e. Rs.6.25.000/-. He submitted that section 389 of the said Code does not give jurisdiction to the Appellate Court to impose such a condition. The learned Advocate appearing for the Respondent No.1 supported the impugned Judgment and Order.

5. I have considered the submissions. Though the first submission of Shri Mohite may appear to be prima-facie attractive, the law laid down by the Apex Court on the subject appears to be against him. In a case reported in 1988 S.C.C.(Cri.) page 984 (Hari Singh v/s. Sukhbir Singh and others), the Apex Court had an occasion to consider the effect of section 357 of the

said Code and in particular sub-section (3) thereof. The Apex Court in paragraphs 10 and 11 held thus:

> "10. Sub-section (1) of section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. it is indeed

a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. **The court may enforce the order by imposing sentence in default."** (Emphasis supplied).

6. It must be borne in mind that the conviction is under section 138 of the said Act of 1881. The Apex Court in the case reported in (2001) 6 SCC page 463

(Dalmiya Cement (Bharat) Ltd. v/s. Galaxy Traders and Agencies ltd. and others) has held that section 138 makes a civil transaction to be an offence by legal fiction. The Apex Court held that the object of the said provision is of making a special provision by incorporating a strict liability so far as a cheque is concerned. The Apex Court further held that efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged.

7. It will be necessary to refer to the decision of the Apex Court in the case reported in 2002(2) S.C.C. page 420 (Suganthi Suresh Kumar v/s. Jagdeeshan). The Apex Court was dealing with the submission that the Court has no power to direct punishment in default of payment of compensation. While dealing with the said submission, the Apex Court held :

> "9. It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141

that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia v/s. Union of India that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.

10. That apart, section 431 of the Code has only prescribed that any money (other than fine) payable by virtue of an order made under the Code shall be recoverable "as if it were a fine". Two modes of recovery of the fine have been indicated in section 421(1) of the Code. The proviso to the sub-section says that if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for levy of the amount.

11. **When this Court pronounced in Hari Singh v.Sukhbir Singh that a court may enforce**

> **an order to pay compensation "by imposing a sentence in default" it is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger Bench of this Court. Hence learned Single Judge of the High Court of Kerala has committed an impropriety by expressing that the said legal direction of this Court should not be followed by the subordinate courts in Kerala.** We express our disapproval of the course adopted by the said learned Judge in Rajendran v. Jose. It is unfortunate that when the Sessions Judge has correctly done a course in accordance with the discipline the Single Judge of the High Court has incorrectly reversed it." (Emphasis supplied.

Therefore, the first submission of Shri Mohite has no merit.

8. A reference will have to be also made to the decision of the Apex Court reported in 2001(2) S.C.C. page 416 (Stanny Felix Pinto v/s. Jangid Builders Pvt.Ltd. and another). In the said judgment the Apex

Court held thus:

> "2. When a person was convicted under section 138 of the Negotiable Instruments Act and sentenced to imprisonment and fine he moved the superior court for suspension of the sentence. The High Court while entertaining his revision granted suspension of the sentence by imposing a condition that part of the fine shall be remitted in court within a specified time. It is against the said direction that this petition has been filed. In our view the High Court has done it correctly and in the interest of justice. We feel that while suspending the sentence for the offence under section 138 of the Negotiable Instruments Act, it is advisable that the court imposes a condition that the fine part is remitted within a certain period. If the fine amount is heavy, the court can direct at least a portion thereof to be remitted as the convicted person wants the sentence to be suspended during the pendency of the appeal. In this case the grievance of the appellant is that he is required by the High Court to remit a huge

> amount of rupees four lakhs as a condition to suspend the sentence. When considering the total amount of fine imposed by the trial Court (twenty lakhs of rupees) there is nothing unjust or unconscionable in imposing such a condition. Hence, there is no need to interfere with the impugned order. As such no notice need be issued to the respondent. Appeal is accordingly dismissed."

9. What has been held by the Apex Court is that while suspending the sentence for the offence under section 138 of the said Act of 1881, it is advisable that the Court imposes a condition that the fine amount is remitted in Court within certain period. The Apex Court observed that if the fine amount is heavy, the court can direct at least a portion thereof to be remitted, as the convicted person wants the sentence to be suspended during the pendency of the appeal. The Apex Court was dealing with a case of an offence under section 138 of the said Act of 1881. The law laid down by the Apex Court will naturally apply also to a case where compensation has been ordered to be paid. Thus when there is a conviction under section 138 of the said Act of 1881, while suspending substantive sentence, it

is advisable that the Appellate Court imposes a condition of deposit of the compensation amount keeping in mind the object of section 138 of the said Code. When the amount of compensation is heavy, the Court can direct deposit of a reasonable amount. Only in exceptional cases, the Appellate Court can grant interim protection without requiring deposit of compensation amount.

10. In the facts of the present case, the learned Addl.Sessions Judge has directed deposit of 50% of the cheque amount which comes to Rs.6,25,000/-. In normal course the learned Judge would have been justified in imposing a condition of deposit of the entire compensation amount. Since the amount was heavy, in view of what has been held by the Apex Court, the learned Additional Sessions Judge was justified in imposing the condition of deposit of 50% of the cheque amount for suspending the order directing payment of compensation.

11. Shri Mohite submitted that considering the various difficulties faced by the Applicant, it is impossible for the Applicant to pay the amount as directed by the Sessions Court. He has invited my

attention to the documents annexed as annexure "G" (page 33 of the petition). In view of this aspect, sufficient time deserves to be granted to the Applicant to pay the amount as directed by the Sessions Court.

12. Hence the following order is passed:

(i) Order dated 22nd August 2005 is confirmed with modification that the time to deposit the sum of Rs.6,25,000/- is extended till 20th January 2006.

(ii) Non-bailable warrant issued against the Applicant will not be executed till 20th January 2006. It is made clear that notwithstanding the time extended by this Court, the Appellate Court will proceed with the hearing of the Appeal if it is ready in all respects.

(iii) Parties and the concerned Court to act on an authenticated copy of this order.

Judge.